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No. 1047

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CITY OF CHICAGO and BOARD OF TRADE OF THE CITY OF CHICAGO,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

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STATEMENT

Pursuant to rule 16(4) of the rules of this Court, appellants submit this brief in opposition to the motion to dismiss filed by the United States and Interstate Commerce Commission, herein collectively referred to as the Government.

The Government does not dispute the substantiality or general public importance of the questions of law here presented. Indeed, that could hardly be done in view of the Commission's own determination that the proceeding was one involving issues of general transportation importance. By its failure to appeal from the district court's decision and by filing a motion to affirm in No. 1048 the Government also concedes that the Commission's reports and orders are, as found by that court, irrational and unsupported by findings and substantial evidence. The sole question raised by the motion is whether appellants may maintain this appeal.

With respect to the merits, the Government incorrectly states (Mot., p. 5) the finding of the district court.[1] It also misstates, as the Commission attempted, unsuccessfully, to do in the district court, the position of appellants. Appellants do *not* take the position that the Act does not permit equalization of rates for unequal distances, and they do *not* take the position, as alleged by the Government (Mot., p. 5) "that the Act as a matter of law requires that rates closely follow differences in distances."[2]

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[1] The question which the district court said it would decline to consider was "whether simple equality of rates without regard to services precludes undue preference and prejudice under Section 3(1) of the Act." (J.S. App., p. A-11) This is an entirely different question from that stated by the Government.

[2] See *infra*, p. 6, for a brief statement of appellants' position, also the fuller statement in appellants' Jurisdictional Statement, pp. 10-18.

ARGUMENT

Title 28 U.S.C. § 1253 provides that "any party" may appeal to the Supreme Court from an order granting or denying a permanent injunction in any action required by Congress to be heard and determined by a district court of three judges. Despite the plain words of the statute, the Government argues that the appellants were the successful parties in the court below and are, therefore, not entitled to appeal.

Appellants were only partially successful in the district court. The major part of the relief sought by appellants was denied. In such a case, the parties aggrieved in part by the decision of the district court may appeal. *Cochran* v. *M & M Transp. Co.*, 110 F. 2d 519, 523 (1st Cir., 1940).

This action was brought for the purpose of obtaining a judicial interpretation of certain provisions of the Interstate Commerce Act upon which appellants' legal rights to just, reasonable, and non-prejudicial export rates depend. Paragraph 11 of appellants' amended complaint alleged not only that the Commission's orders were unsupported by findings and substantial evidence, but also that such orders "rest upon a misconstruction of section 1(5) and 3(1) of the Interstate Commerce Act" and that "such reports and orders are, therefore, unlawful and void" in violation of said Act. Appellants prayed that said orders be set aside and the matter remanded to the Commission for further proceedings "in accordance with law." While the district court found the orders to be irrational and unsupported by findings and substantial evidence, it specifically declined to grant the rest of the relief requested.

The cases cited by the Government are not in point. In *Public Service Com'n* v. *Brashear Freight Lines, Inc.*, 306

U.S. 204, 206-207, appellant, defendant in the court below, sought to appeal from the dismissal of a counterclaim for an accounting for fees due the State of Missouri, although the injunction sought by the plaintiffs against the Commission's enforcement of a Missouri regulatory statute had been denied. This Court held that such a direct appeal could not be prosecuted "unless there is a proper appeal from a decree granting or denying an interlocutory or permanent injunction." The Court added, by way of dicta, that the Commission, being the successful party, could not appeal from a denial of the injunction, although that question was not presented, citing *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 176, and *New York Tel. Co.* v. *Maltbie*, 291 U.S. 645, which are the only other cases cited on this point in the Government's motion here.

Neither *Lindheimer* or *Maltbie* has any application here. In both those cases, a utility against which a rate order had been entered was successful in setting such order aside, but sought to have this Court review portions of the lower courts' decrees relating to valuation of the utilities' properties. Under those circumstances, the utilities were entirely protected by getting the orders complained of set aside. No further action could be taken against them except by an order which would again be reviewable by the courts.

The situation here is entirely different. For one thing, appellants seek affirmative relief. A commission order denying them that relief can be regularly set aside by the courts for lack of findings or substantial evidence every fourth or fifth year from now on and appellants will never obtain relief. The history of this litigation shows that appellants cannot obtain the relief to which they are entitled until the courts decide the questions of law relating to the correct interpretation of the statute.[3] In addition,

this litigation has not been terminated and appellants are faced with the direct and immediate threat of further proceedings which would serve no useful purpose whatsoever until the questions of statutory interpretation are settled.

That the Commission did incorrectly interpret the statute cannot be doubted.[4] The contrary is not shown by the citation of some prior cases which were correctly decided (Mot., p. 6, n.5). The lawfulness of the present order must

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[3] The motion of the Government makes no suggestion that the Commission will now follow a correct interpretation of the statute. It merely requests that the Commission be given another opportunity "to consider further what justifications there may be, consistent with Sections 1(5) and 3(1) of the Act, for the rate pattern that resulted from its prior order." The Commission has already had three opportunities to do this subsequent to its original decision. There is no reason why it should have another opportunity for *post hoc* rationalization of a rate adjustment obviously based on an incorrect interpretation of the statute.

[4] The Government concedes, as it must, that "the Division held that the port of Chicago was unduly prejudiced only insofar as the rates were higher than those to the Gulf ports." It suggests (Mot., p. 4) that such action was justified by the Commission's finding that there was "no showing that Chicago was unable to compete effectively at such rates for the soybean traffic." Actually Chicago did make a showing that it could not effectively compete for such traffic, but it is well settled as a matter of law that no such showing is necessary to establish undue prejudice, and the fact that traffic continues to move on prejudicial rates is no justification for such rates. *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 206 I.C.C. 445, 448 (1938), order sustained in *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588, 592 (S.D. W. Va., 1935), affirmed per curiam *Chesapeake & O. Ry. Co.* v. *United States*, 296 U.S. 187; *Chrysler Corp.* v. *Akron, C. & Y. R. Co.*, 279 I.C.C. 377, 404 (1950), order sustained in *Illinois Cent. R. Co.* v. *United States*, 101 F. Supp. 317, 323 (N.D. Ill., 1951); *Consolidated Mining & S. Co. of Canada* v. *N. Y. C. R. Co.*, 299 I.C.C. 231, 244 (1956), affirmed in *Ores, United States and Canada Origins to Eastern U. S.*,

be determined by what the Commission did here, not by what it did in other cases. Thus, the Government's reliance on *City of Wilmington* v. *Alabama G. S. R. Co.*, 316 I.C.C. 709, 725-726; 319 I.C.C. 620; and *Galveston Commercial Ass'n* v. *Galveston, H. & S. A. Ry. Co.*, 128 I.C.C. 349, 379, 389 is clearly misplaced. In fact, those cases clearly establish the correct interpretation of the statute and the principles of decision which the Commission should have followed here. What appellants are seeking here is to compel the Commission to follow the same interpretation of the statute and the same principles for determining preference and prejudice that it followed in the cited cases. If the Commission followed that interpretation and those principles, it would be compelled on the facts presented here to accord appellants the relief they seek. But, as indicated in the Jurisdictional Statement, the Commission has departed from that interpretation of the statute and those principles of decision in recent years and has proceeded on the theory that it has the right to compel or permit port equalization regardless of what the distances are. There simply is no other way to explain what the Commission has done here in the face of the great disparity in relative distances and services, and the Government suggests no other basis for the Commission's decision. The Commission made no attempt to distinguish the cited cases in its reports, but simply ignored them.

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303 I.C.C. 87, 94 (1958); *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.*, 318 I.C.C. 229, 246 (1962), order sustained in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359, 369-374 (N. D. Ill., 1963). Furthermore, as shown by the *Consolidated Mining* and *Cudahy* cases, the fact that Chicago dominates the soybean traffic from other areas is no defense to its complaint here. Chicago is entitled to non-prejudicial rates from central and southern Illinois regardless of the traffic it can obtain from other areas.

Both appellants and their adversaries (appellants in No. 1048) want to bring this litigation to an end and have their legal rights finally determined. Only the Government wants to prolong it. Even if the Government's argument were applicable here, such hypertechnicalities should not be allowed to defeat the ends of justice and cause unnecessary and wasteful litigation.

In any event, however, there is no merit to the Government's contention. As pointed out in our Jurisdictional Statement, pp. 19-21, Title 5 U.S.C. §706 specifically imposes on the courts the duty of deciding all relevant questions of law and of interpreting statutory provisions in reviewing administrative action. Appellants unsuccessfully sought to have the district court discharge these duties and, we submit, an appeal will lie from its failure to do so.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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